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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 74-57

JOHN DYKMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION AND APPENDIX

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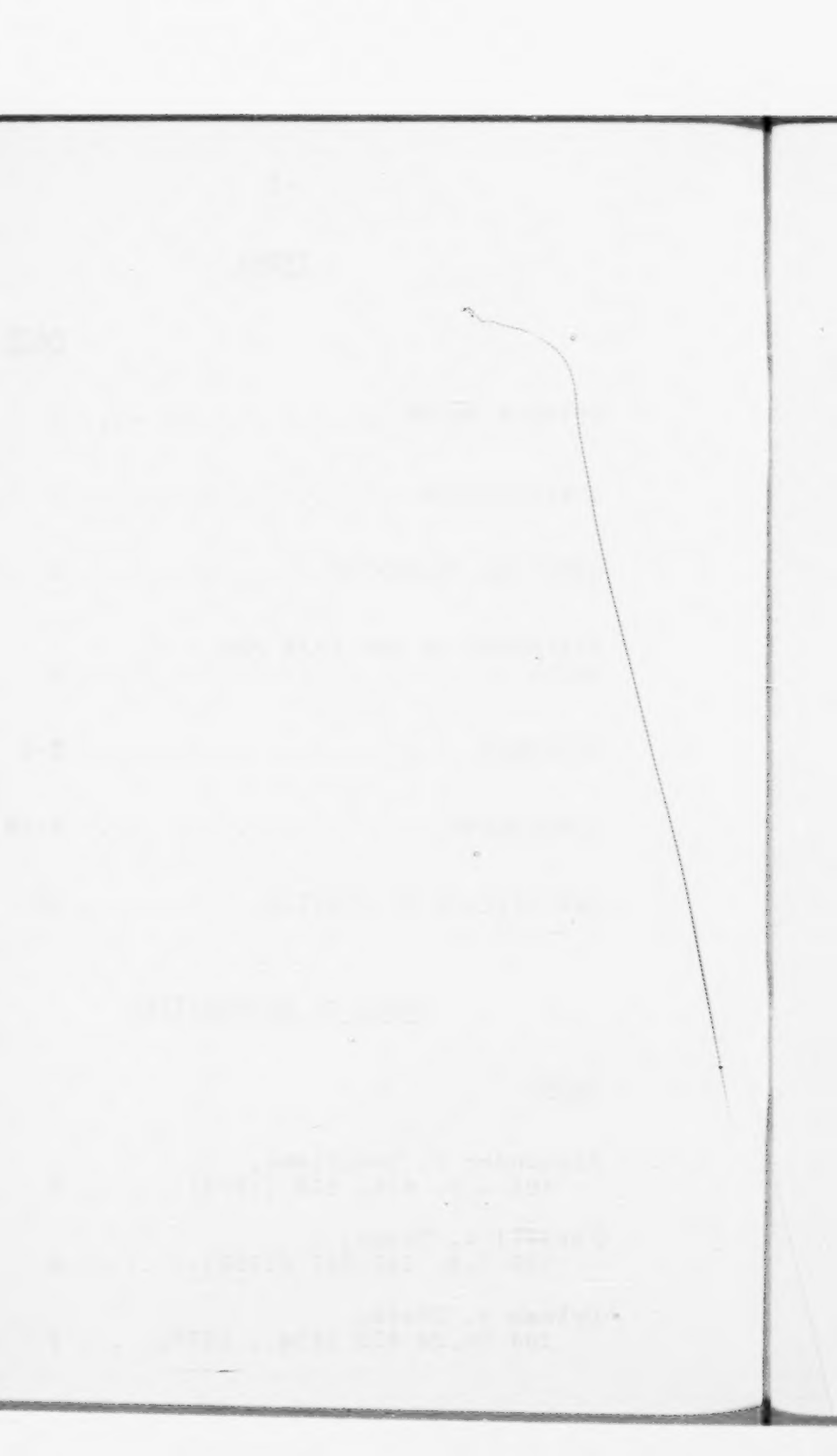

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 294 So.2d 633 (Fla., 1973), and is attached to petition for writ of certiorari as Appendix 1-7.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW HOLDING THAT THERE WAS NO VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS IN THE SUMMARY DENIAL OF PETITIONER'S MOTION ATTACKING HIS GRAND JURY, WHERE THAT MOTION CONTAINED ONLY BARE ALLEGATIONS AND CONCLUSIONS DEVOID OF ANY FACTUAL ALLEGATION OR SUPPORTING PROOF.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the Statement of the Case and Facts as set out by the petitioner.

ARGUMENT

Prior to trial the petitioner filed a motion to attacking the composition of the Grand Jury which had issued his indictment as well as the selection procedures for the petit jury which was to serve at his trial. Both attacks were considered and ruled upon by the Supreme Court of Florida, although the instant case raises only the petitioner's Grand Jury attack.

Petitioner was found guilty of murder in the second degree after a jury trial upon a charge of first degree murder of his wife. His appeal, filed in the District Court of Appeal of Florida, Third District, was transferred by that court to the Supreme Court of Florida, on an issue of original jurisdiction pursuant to Florida Constitution Article V §3 (b) (1). The Supreme Court of Florida accepted the transfer only as to the issue of grand jury selection, the same issue upon which the instant petition is based. The Florida Supreme Court after briefing and oral argument denied relief. Dykman v. State, 294 So.2d 633 (Fla., 1974).

Thereafter, the case proceeded as a "bifurcated" appeal. The remaining six issues, on which the Florida Supreme Court did not accept transfer, were heard by the District Court of Appeal, Third District, which court affirmed the conviction on September 10, 1974, rehearing denied October 14, 1974. Dykman v. State, 300 So.2d 695.

This latter decision is presently on review by petition for certiorari to the Supreme Court of Florida, filed November 12, 1974. (Exhibit A, attached herewith). Said case seeks review of the same conviction presently before this Court in the instant case. Petitioner is therefore simultaneously seeking reversal of the same conviction from the Supreme Court of Florida and the Supreme Court of the United States. Should the Supreme Court of Florida grant relief while the instant case is here pending, it would effectively moot the issues presented before this Honorable Court.

In the motion to dismiss his indictment, the petitioner alleged that the Grand Jury which had indicted him was drawn from an improperly constituted jury pool. As grounds therefore, it was alleged that the Grand Jury Pool purposely discriminated against several classes of people specified as follows:

1. Black persons,
2. Persons with incomes less than $8,000 per year, and low-income

persons generally,
3. Women
4. Blue collar workers
5. Persons between the ages of 18, 19 and 20,
6. Persons between the ages of 21 and 34,
7. Persons over 60 years of age
8. Persons with less than a 12th grade education
9. Persons of Latin American decent
10. Persons in the southern most part of Dade County and the northern most part of Dade County
11. Persons from the "inner city" and generally black "ghetto" areas
12. Persons who have registered to vote in Dade County within the last three months.

No further specific allegations were made as to the basis for the alleged invalidity of these classifications and no underlying facts were alleged. On the motion as presented the trial court denied the requested relief and denied the petitioner an evidentiary hearing. After conviction, this ruling was assigned as error to the Supreme Court of Florida and was ruled upon in that court. In affirming the decision of the trial court the State Supreme Court based its ruling not as petitioner alleges by weighing constitutional rights against the interest of the State in judicial administrative efficiency, but rather on the inherent insufficiency of the petitioner's motion. The motion was purely conclusory in nature and contained no factual allegations upon which the court could ascertain the basis for judging the legal sufficiency of the motion. In so holding, the

court was following well established State and Federal law that before a full scale investigation of the State's jury processes is warranted, it is incumbent on the petitioner to allege some factual basis from which it may be determined that the jury pool can be deemed to be suspect. United States v. Hoffa, 349 F.2d 20 (6th Cir., 1965); Windom v. United States, 260 F.2d 384 (10th Cir., 1958).

The instant case raises the same issues as were presented to this court in Silva v. Florida and Seay v. Florida, United States Supreme Court, Case No. 73-6549, and Rojas v. Florida, United States Supreme Court Case No. 73-6669. In all three cases this Court recently denied certiorari on October 15, 1974. Since the facts and issues are here substantially similar, it is respectfully submitted that the instant case presents no better grounds for the issuance of a writ of certiorari.

Under Florida law Grand Jury records and proceedings are secret and may only be disclosed for certain limited purposes and under particularized circumstances. Gonzalez v. State, 220 So.2d 393 (Fla., 3rd DCA, 1969). Chapter 57-550, Laws of Florida, in Section 6 thereof provides that the names

> "...of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the

> list itself in a secure metal-box to be known as the 'Grand Jury Box', which shall be securely locked and sealed and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission."

The seal may be broken and the box opened only when the Grand Jury is drawn. Thereafter, the box must be again locked and resealed by the Grand Jury Commissioners. The obvious intent of the above legislation is that the names of those citizens placed upon the Grand Jury Master List and serving upon a particular Grand Jury shall remain a secret until the conclusion of their service. Accordingly, in seeking disclosure of such information provided by State law to be secret, the burden is on the accused to plead and prove, with the greatest accuracy and precision, the irregularities in the selection of the grand jurors which are claimed to have vitiated an indictment. State v. Demetree, 213 So.2d 709, 713 (Fla., 1968).

For a petitioner to establish a constitutional violation of the type here attempted, he must first prove that the group allegedly excluded constitutes a

distinguishable or cognizable class. In addition to the failure to allege any factual bases for petitioner's contentions as discussed above, there is the additional failure to specify any use of the selection system by officials so as to intentionally or unintentionally result in an invalid array of jurors. Since Federal court faced with this issue have been reluctant to conclude the presence of constitutional violations in the absence of any allegations that the group excluded constitutes a distinct and separate class, the failure of the instant petitioner to so plead was a most serious omission.

A cognizable class for the purpose of jury challenges has been defined as one which has a definite composition, that is, which contains some factor which defines and limits the group. It is not one whose membership shifts from day to day or whose members can be arbitarily selected. The group must have cohesion as well as some basic similarity in attitudes or ideas or experience which is present in the members of the group and which can not be adequately presented if the group is excluded from the jury selection process. Thus, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. United States v. Guzman, 337 Supp. 140 (S.D.N.Y., 1972); affirmed 468 F.2d 1245 (2nd Cir., 1972). Thus, age as

a measure of representation has been disfavored as a criteria for jury standards when drawing age brackets are arbitrarily drawn in order to constitute categories for measuring the legality of jury selection. United States v. DiTommaso, 405 F.2d 385 (4th Cir., 1968); United States v. Gooding, 473 F.2d 425 (5th Cir., 1973). Similarly, a one year residence requirement for persons serving on federal grand and petit juries was held not to be an unconstitutional requirement in United States v. Perry, 480 F.2d 147 (5th Cir., 1973), where as a result no cognizable group was excluded.

Moreover, petitioner's allegations do not amount to a prima facie showing of systematic exclusion of necessary groups from his grand jury. It has been held that in order to make a prima facie showing of systematic exclusion from the grand jury petitioner would have the burden of proving first that the opportunity for discrimination existed by reason of the use of a biased source of potential jurors, and second that the use of such an infected source produced a significant disparity between the percentages in the source and the percentage on the grand jury panel. Wright v. Smith, 474 F.2d 349 (5th Cir., 1973). Since there need not be proportional representation on the grand jury of each element of the population entitled to serve, Cassell v. Texas, 339 U.S. 282-287 (1950), it is necessary to establish more than statistical probabilities in order to establish a prima

facie case. Alexander v. Louisiana, 405 U.S. 625, 629 (1972); Whitus v. Georgia, 385 U.S. 545, 552 (1967). Alexander requires in addition that there be an opportunity for discrimination in addition to a showing of steady underrepresentation of a cognizable class of citizens on the jury panels for an appreciable period of time.

Petitioner's conclusory allegations on all these counts foreclosed the possibility that the trial judge could ascertain whether there was any legal basis for petitioner's ultimate conclusions. In the absence of any factual allegation upon which petitioner might be able to establish a prima facie showing based legally sufficient factual allegations, the State courts were eminently correct in determining that an evidentiary hearing was not required.

CONCLUSION

Petitioner's failure to set forth any factual allegations to support his legal conclusions deprived the Supreme Court of Florida of any reasonable basis for concluding the instant Grand Jury was constitutionally suspect. That same deficiency renders insubstantial the federal question here presented. It is respectfully

submitted that this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition was served upon the HONORABLE JOEL HIRSCHHORN, 1040 City National Bank Building, 25 West Flagler Street Miami, Florida 33130, this____day of December 1974.

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APPENDIX

Appendix 1

IN THE SUPREME COURT
OF FLORIDA

JOHN DYKMAN,	**	CASE NO. 46,461
Petitioner,	**	
vs.	**	
THE STATE OF FLORIDA,	**	
Respondent.	**	
	**	

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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Appendix 2

TO: THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, JOHN DYKMAN, presents this his Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed a decision of the District Court of Appeal of Florida, Third District, dated September 10, 1974, (R. 1-7). The Petition for Rehearing was denied October 14, 1974, (R. 8).

2. This Petition is presented under and pursuant to Article 5, Section 3, of the Florida Constitution and Rule 4.5(c) of the Florida Appellate Rules.

3. This Petition is accompanied by those necessary portions of the record of the proceedings below, including the decision Petitioner seeks to have reviewed and a supporting brief.

4. The following are the facts of the case:

> (a) "Appellant, a 78 year old man reported to the police that his wife was missing. Police officials later found the dismembered portions of a woman's body, wrapped in plastic bags, along the banks of a canal in the city; this body was identified as the body of appellant's wife, (although appellant has made some effort to attack this identification). After the identification had been made, two police officers went to appellant's house and

> informed him that they would like to search the house in connection with the investigation of the disappearance of his wife. Appellant agreed to this proposition, and signed a consent form. Appellant now asserts that this apparent consent was invalid, in that (1) the police officers deceived him by not notifying him that a body identified as that of his wife had been discovered, (2) the situation of two policemen confronting a man of his age fraught with coersion, (3) the police officers failed to warn appellant of his right not to consent to the search or any of his other 'Miranda' rights, and (4) that he was not competent to give a valid consent. The trial court denied the motions to suppress." Dykman v. State, 294 So.2d 633 (Fla., 1973).

(b) Attorney for Petitioner put into issue petitioner's competency to stand trial and assist counsel in the preparation of his defense. At the hearing on this issue, only one doctor, of the four who examined Petitioner, reached the conclusion that Petitioner was competent to stand trial. This conclusion, however, was based on examination conducted several months before the trial, unlike those conducted by the other doctors prior to trial. The trial court found Petitioner competent to stand trial and assist counsel in his defense.

(c) Petitioner at trial sought to introduce a statement made by a witness, who could not be located, that the witness saw green bags, (allegedly

containing the deceased), floating in the canal at a time neighbors of the Petitioner stated they had smelled a decaying body at Petitioner's residence. Petitioner requested the Court to waive the hearsay rule and permit this relevant and exculpatory testimony to be admitted. The trial court refused to admit the testimony.

(d) During jury deliberations, the jury requested to be reinstructed on Murder in the Second Degree. DYKMAN brought to the Court's attention that all the instructions as to lesser included offenses had to be included. The Court then reinstructed the jury, excluding excusable and justifiable homicide. The jury returned to deliberate and then reached its verdict. The Court then, over DYKMAN'S objection, attempted to rectify its already prejudicial error by reading just the omitted instructions to the jurors and again sent them back to the jury room where within seconds they promptly returned with a conviction of Murder in the Second Degree.

5. On the foregoing facts, the District Court of Appeal, Third District, was presented with the following points of law:

(a) Whether the trial court erred in denying Petitioner's Motion to Suppress Evidence where Petitioner established that the search form executed by Petitioner was not given intelligently, knowingly, freely nor voluntarily and where it was shown that Petitioner had not been advised of his right

to refuse to consent to the search or his right to an attorney or that anything found would be used against him in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

(b) Whether the trial court erred in declaring the Petitioner competent to stand trial and assist counsel in the preparation of a rational defense where the unrebutted testimony clearly established Petitioner's incompetency to stand trial and assist counsel.

(c) Whether the trial court erred in refusing to permit Petitioner to elicit relevant, material and exculpatory testimony from a prosecution witness on the grounds that such testimony was hearsay even though Petitioner was willing to waive the hearsay objection.

(d) Whether the trial court erred in permitting the trial jurors to deliberate and arrive at their verdict upon improper, defective and prejudicial jury instruction over Petitioner's objection and contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

6. The District Court of Appeal, Third District, presented with these issues and facts rendered the following opinion:

> (a) Competency: Appellant's first point urges that the trial court erred in declaring the appellant competent to stand trial and to assist counsel in his defense. Four medical witnesses testified upon this issue in the proceedings prior to trial.

Based on the testimony of these witnesses, the appellant argues only that the court abused its discretion in finding that the appellant was capable of assisting in his defense. Thus, there is no issue presented as to the actual competency of the appellant who as a seventy-eight year old man, was in full possession of his faculties. Medical expert testimony showed that any claimed lapses of memory could be the product of either (1) appellant's age or (2) the fact that it was convenient for the appellant to fail to remember certain events. Faced with this situation and faced with conflicting testimony, the trial judge did not abuse his discretion in holding that appellant was competent to stand trial. See Brown v. State, Fla. 1971, 245 So.2d 68; Brock v. State, Fla. 1954, 69 So.2d 344; and Pressley v. State, Fla. App. 1972, 261 So.2d 522.

(b) Search: A review of this record convinces us that we cannot fault the trial court upon his finding that the defendant voluntarily consented to the search. See James v. State, Fla.App. 1969, 223 So.2d 52; cf. Powell v. State, 131 Fla. 254, 175 So. 213 (1937). We decline to adopt the

rule proposed by the appellant that a defendant must be separately advised of his right to refuse consent to a search before his consent is given. See United States v. Goosbey, 419 F.2d 818, (6th Cir. 1970).

(c) Hearsay Evidence: The seventh point urges error because the court refused to allow appellant to introduce hearsay evidence which he considered favorable to his defense. He relies upon Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, (1973), and Cox v. State, Fla.App. 1969, 219 So.2d 762.

The holding in Chambers does not justify the admission of hearsay in every case where the defendant wishes to waive the rule. In the instant case the hearsay evidence sought to be admitted was the statement of a third person, who was not present at the trial, allegedly made to the police officer during his investigation of the crime. If we proceed upon the principle that the basis for the exclusion of hearsay in a trial is the absence of the oath of the person making the statement

and the absence of the opposing party's right to cross-examine as to the truth of the statement, then these absences are not matters which the defendant seeking to introduce the statement may waive. The holding in Chambers v. Mississippi appears to be; "In these circumstances, where constitutional rights directly effecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." We accept this rule as a salutory development in criminal law. In the application of such a rule, it must be pointed out that the Supreme Court in setting forth "these circumstances" said, "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." The statements referred to were confessions and were found to have been made spontaneously. Also, they were found to be corroborated by other evidence and by the sheer number of independent confessions. And finally, they were found

to fall within the bounds of "penal-interest rationale." The court further found;

"Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and had been under oath. He could have been cross-examined by the State and his demeanor and responses weighed by the jury."

We find no such circumstances to justify the hearsay evidence offered in this case.

In Cox v. State, supra, although the statement was classified as hearsay by the court, it was pointed out that "(t)he witness was under oath and was present in the court room so that he might be cross-examined concerning the description which he gave to the police." No such situation exists in the present instance.

(d) Jury Instructions: Appellant's second point urges reversal on the ground that the trial court allowed the jury to deliberate and arrive at the decision upon improper, ineffective jury instructions. A brief history of the circumstances giving rise to this point should be set out. At the conclusion of the trial,

the court instructed the jury as to the elements of first degree murder and lessor included offenses and an instruction relating to excusable and justifiable homicide was included at defendant's request. No error is urged upon the giving of these instructions. After deliberating for a period of time, the jury requested permission to return to the courtroom in order again to be instructed on first and second degree murder. In response, the court repeated its instructions on murder in the first, second and third degrees, as well as on manslaughter. The appellant objected and urged that the complete instructions to the jury be read under the rule stated in Hodges v. State, Fla. 1965, 172 So.2d 824 and applied in Stills v. State, Fla. App. 1973, 272 So.2d 174 and Tamayo v. State, Fla. App. 1970, 237 So.2d 251. After the jury had been in the jury room for approximately five minutes, it was recalled by the trial court for the purpose of repeating the remainder of the instructions. It was established by testimony of the bailiff

that the jury had in fact announced that it had reached a verdict prior to the time it was recalled by the court. Nevertheless, the jury returned upon the call of the court whereupon the omitted instructions were given and then it returned to the jury room where it very quickly announced again that it had reached a verdict. The verdict of guilty of second degree murder was handed up and recorded.

The Appellant now argues in essence that he was prejudiced in that the jury was permitted to deliberate without benefit of repeated instructions on excusable and justifiable homicide and the summary instructions prescribed by the standard jury instructions to be given at the end of instructions of degrees of homicide.

It is apparent that under the holdings in Hodges, Stills and Tamayo, supra, the failure of the judge to give the entire instructions immediately was error. It is equally apparent, however, that it was not prejudicial error. It is our view that the court's error in failing to give the complete instructions upon the request of the jury for instructions on first and second degree

murder was cured by the court's subsequent giving of the instructions requested by the defendant. See Grant v. State, 33 Fla. 291, 14 So. 757 (1894), where it was held that the verdict of the jury in a case of felony is not complete or conclusive until accepted by the court and recorded. In addition, this court acts upon the record as it stands and not upon our supposition of what the mental processes of the jury may have been. See Van Eaton v. State, Fla. 1967, 205 So. 2d 298. Here, we are presented with a record which shows a complete instruction prior to the jury verdict. Possibility that the jury might have entered some verdict other than guilty of second degree murder if they had had the complete instructions is not supported by any rational argument in this case.

The second reason that we hold the error of failing to give the full instructions upon the first return of the jury is not prejudicial is that under the facts of this case there was never a defense tendered other than "not guilty." There is no contention of self-defense or justifiable homicide. We hold that the reading of the omitted portions of the instructions could not have influenced the

jury in its decision to hold the appellant guilty of second degree murder. Therefore, in this cause where the proof of guilt is clear, we hold that reversible error is not presented under appellant's second point.

7. From this opinion, the Petitioner brings this Petition for Certiorari and would allege further:

(a) Competency: The decision of the District Court of Appeal, Third District, is in conflict with Brock v. State, 69 So.2d 344 (Fla., 1954); Fowler v. State, 255 So.2d 513 (Fla. 1971); Julias v. State, 271 So.2d 807 (Fla., 3rd DCA, 1972); Pressley v. State, 261 So.2d 522 (Fla. 3rd DCA, 1972); Rojas v. State, 296 So.2d 627 (Fla., 3rd DCA, 1974), for the reasons set forth in greater detail in the attached brief.

(b) Search: The decision of the District Court of Appeal, Third District, instanter is in conflict with Dunavant v. State, 46 So.2d 871 (Fla. 1950), as the consent to search was based on a mispresentation and for the reasons set forth in greater detail in the attached brief. Petitioner would further suggest that this Court adopt those principles of law espoused in United States v. Dichiarinte, 445 F.2d 126 (7th Cir., 1971), and Perkins v. Henderson, 418 F.2d 441 (5th Cir. 1969), State v. Williams, 432 P.2d 679 (Oregon 1967), and Schorr v.

State, 499 P.2d 450 (Okl. Cr. 1972); State v. Ganz, 297 So.2d 614 (Fla. 4th DCA, 1974).

(c) Hearsay Evidence: The decision of the District Court of Appeal. Third District, instanter is in conflict with Cox v. State, 219 So.2d 762 (Fla. 3rd DCA, 1969), where the defendant was entitled to waive the hearsay rule and for the additional reasons set forth in the attached brief.

(d) Jury Instruction: The decision of the District Court of Appeal, Third District, instanter is in conflict with Hedges v. State, 172 So.2d 824 (Fla., 1965); Tamayo v. State, 237 So.2d 251 (Fla. 3rd DCA, 1970); and Stills v. State, 272 So.2d 174 (Fla. 1st DCA, 1973), which require a new trial when the trial judge fails to give complete jury instructions when requested by the jurors and for the additional reasons set forth in the attached brief.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari and enter its Order quashing the decision sought to be reviewed and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

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Appendix 15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above foregoing Petition for Writ of Certiorari was hand delivered to the Office of the Attorney General, 8585 Sunset Drive Miami, Florida, this 12th day of November, 1974.

I HEREBY FURTHER CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was hand delivered to the Office of the Clerk, District Court of Appeal, Third District of Fla., 1350 N. W. 12th Avenue, Miami, Fla., this 12th day of November, 1974.

JOEL HIRSCHHORN, ESQUIRE